NOTES ON THE DEVELOPMENT OF AMERICAN CIVIL CHURCH LAW.

THE phrase "civil church law" is here used as a convenient designation for the body of statute law that has been developed in the American commonwealths in respect to the civil status of religious institutions. This body of legislation reveals, to a considerable extent, the American concept of the normal relàtion of church and state, and is in so far a reliable guide in the study of the attitude of the people toward their own ecclesiastical institutes.

That the state has nothing to do with the church is a conviction that lies deep in the political consciousness of Americans. The "complete separation" of church and state has been, since the beginnings of the Republic, a political cry that has never failed to rally the multitude. Like most phrases in the popular language of politics, it holds the kernel of a truth, but does not fairly express that truth. The complete separation of church and state — of the ecclesiastical and political institutions of society, has never been and can never be realized among a people of modern civilization. There must needs be a lively connection between the civil and the religious powers of a people, and the development of civilization will inevitably differentiate this connection and cause it to be realized in an ever-increasing range of affairs.

The time was, when it was universally regarded as a function of the civil government to see to it that all subjects — in theory, at least — sustained a definite ecclesiastical relation; and the aggregate of those relations that had the sanction of the civil power constituted an ecclesiastical establishment. American political philosophy, as it has developed during the past century, has preserved the concept that the civil power is charged with a duty in respect to the religious affairs of the people, and

to-day regards it as a function of civil government to make it legally possible and socially convenient for all the people to sustain voluntary ecclesiastical relations. The difference between the former and the latter concept has been caused by the expanding ideas as to individual liberty in expression and association. At the present time ecclesiastical relations must be voluntary, legal and socially convenient; but the demand upon the civil power to realize these conditions is as great as it ever was upon a sovereign to protect an established church. The ecclesiastical function of the American governments is now guaranteed by a public opinion that has been gaining strength for four generations and has become bed rock for our political constructions. For this reason the exercise of this function is scarcely seen upon the surface of society, and its existence is rather assumed than felt. Freedom of individual and associated thought and action is assumed by Americans of the present generation with the careless confidence with which one is apt to think of a birthright.

The history of American ecclesiastical law divides naturally into two periods — one of colonial and the other of national life. The institutions of the first period have value to-day chiefly in the historical study of particular organizations. Within the latter period there have been three stages of legal development, in the phenomena of which can be seen the growth of a national policy that is unique in Christendom. These notes deal chiefly with the more recent phases of such development, as contributing more of current value to the study of American ecclesiology.

I. The Beginnings of the Law.

At the outbreak of the American Revolution the colonies could be divided ecclesiastically into three groups. In one group, consisting of New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, the direct establishment of the communion of the Church of England was more or less complete in law. In the second group, consisting of Massachusetts, New Hampshire, Rhode Island and Connecticut, the congregational form of ecclesiastical

organization on the basis of the territorial parish was established in law and in fact. In the third group, consisting of Rhode Island and Pennsylvania, no ecclesiastical establishment had been developed either in law or in fact. Wherever there was an establishment, the ecclesiastical law was largely political and administrative in its nature. Ecclesiastical organization existed for the most part as the machinery for the exercise of the ecclesiastical function of the state.

As a result of political revolution, the direct establishments by royal authority were nullified in law and were degraded in popular estimation. The indirect establishments in the New England colonies, however, built upon provincial legislation and local administration, remained undisturbed for many years. There remained, moreover, as survivals of the direct establishments, a number of incorporated parishes in New York and Virginia and a few in other colonies. As remains of a still earlier establishment in New York, there were three or four incorporated Reformed Dutch churches that had received special protection by the treaty of Breda in 1664.

The Revolution left the religious life of the Americans very near to a condition of coma. During all the colonial period dissent had resisted the legal church establishment, especially the system of compulsory taxation for its support, and the overthrow of British sovereignty brought its great opportunity. A demand developed very generally, even in the New England commonwealths, for a complete divorcement of political and ecclesiastical affairs. A fair illustration of the sentiment that very generally prevailed at the close of the Revolution is to be found in the act of the Assembly of Virginia of the year 1785, the preamble of which says:

> That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty.
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> That it is time enough for the rightful purposes of civil government for its officials to interfere when principles break out into overt acts against peace and good order.

At the formation of the federal government, religious liberty was secured to the people of the United States, so far as the action of Congress was concerned, by the provisions of the Constitution, Article IV, Chapter 3, and the first amendment. Both of these provisions, it will be seen, were limitations upon the powers of Congress only. Neither the original Constitution nor any of the early amendments undertook to protect the religious liberty of the people of the states against the action of their respective state governments. The development of the local peculiarities in the ecclesiastical institutions of the people of the several states and sections of the country continued, therefore, without interruption. The several colonial legislatures had granted a few charters of incorporation to local churches, and this practice was continued for a few years by the state legislatures. It was, however, early abandoned, because of the objection made by the political minorities — and not without truth — that such particular charters of incorporation constituted special legislation secured by political influence.

At this period the churches were beginning to revive from the exhaustion caused by the war, and were becoming actual and potential possessors of property. Legal means for securing property to pious and charitable uses were sorely needed. Hence a demand arose in several of the middle states for a uniform procedure, through which the local organizations of all religious denominations could assume the corporate form. To meet this demand the legislation was enacted which characterizes the second stage of general development.

II. THE ERA OF THE GENERAL STATUTE.

The first general statute that could serve the churches of all denominations was passed by the State of New York, April 6, 1784. It authorized all local religious bodies to appoint trustees, who should be bodies corporate for the purpose of caring for the temporalities of the churches. The preamble of this statute recited that, under the colonial régime, many of the churches, congregations and religious societies in the state

had been put to great difficulties to support the public worship of God, by reason of the illiberal and partial distribution of charters of incorporation to religious societies; that many charitable and well-disposed persons had been prevented from contributing to the support of religion, by the want of proper persons authorized by law to take charge of their pious donations; and that many estates purchased or given for the support of religious societies were then vested in private hands, to the "great insecurity of the society and to the no less disgust of many of the good people of the state." An act of similar intent and like provisions was passed nine years later in the State of New Jersey, and these two statutes became the models for similar acts in many of the Northern states.

These early statutes resulted from the necessity of providing legal trustees in whom might vest the title to property, and were enacted at a time of low religious activity and of bare toleration of the religious bodies by the leaders of the people in legislation. The provisions of the laws were very meagre. As a rule, trustees were to be elected annually by the members of the religious society and were, in fact, mere trustees holding a legal title; except where the society itself became the corporation, the trustees had not the powers that were given the directors of other private corporations. The amount of real and personal property that might be held was everywhere placed at a low figure, in some cases not more than two thousand dollars in value. The limit upon the annual income to be derived from property was, as a rule, proportionately low. No reference was made to particular ecclesiastical polity, save in the case of Protestant Episcopal churches. For such churches the usage had survived from the days of the colonial establishments of constituting the rector, wardens and vestrymen collectively the corporation and at the same time the trustees for the attending congregation. The powers conferred upon corporations that might come into being under these general statutes were, in general, very limited; and nowhere were such corporations allowed to be self-perpetuating.

The prevailing policy in legislation during the first third of

the present century seemed based on the idea that the civil power should treat all the religious organizations alike, by doing as little as possible for any of them. Partiality to religious denominations on the part of state legislatures was dreaded, and there was a very real fear among the law-makers that something might be done toward re-creating an ecclesiastical establishment. Danger was seen in placing the control of any accumulation of property in the hands of spiritual functionaries. Of the spirit of the time we have evidence in dicta contained in a decision of a New York court.

It was the intention of the legislature to place the control of the temporal affairs of these societies [religious societies] in the hands of a majority of corporators, independent of priest, bishop, presbytery or synod or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees and to fix the salary of the ministers.

This language was used with reference to the New York law of 1813, which superseded the law of 1784.

One effect of these general statutes has made a deep impression upon the churches themselves. It is coming now to be generally conceded by the students of American ecclesiology that the anomaly of the "religious society," as an ecclesiastical element distinct from the body of church members, is a product of the civil law; and, although it may have had its origin in the territorial parish of the New England colonies, its development came in the decisions of the courts interpreting the provisions of the general statutes. Wherever a religious incorporation was effected, the law came to recognize three distinct factors in each local religious organization: first, the religious society, representing the congregation in the habit of attending the public services of the church; second, the body of church members, the spiritual society; and, third, the corporation. Each of the factors had separate interests that the law was bound to safeguard.

The method of providing for the incorporation of religious societies by means of a general statute has developed unequally

in different sections of the country, and it has not yet been adopted in all the states. As late as the year 1866 the states of Rhode Island, Virginia and South Carolina had no such statute. Thirty years later, in 1896, a general statute of incorporation was still forbidden by constitution in the states of Virginia and West Virginia. In both these states the circuit courts of the counties are authorized to appoint for religious societies trustees in whom may vest the title to property devoted to religious uses. In a number of states, even at the present time, there is no distinct legislation for the incorporation of churches. We find provision for "educational and religious" organizations, and for "religious, social and benevolent" bodies; and one state, Colorado, has an interesting provision for the formation of joint stock companies for "religious, educational and charitable" purposes. There is, however, reason to believe that, with the increase in the numbers and material wealth of churches in the Southern states, incorporation will become more common and general statutes will be enacted specifically for the incorporation of churches.

III. The Development of Denominational Provisions.

The third stage in the development of the civil church law has been the result of specializing legislation in two directions. One of these has been mentioned above, namely, discrimination between ecclesiastical organizations proper and other social, educational and philanthropic organizations. The second form of specialization, however, has produced more marked results than the first. In the states having the most highly developed legislation, the general provisions of the statutes have, from time to time, been supplemented with special optional provisions for corporations of particular religious denominations.

The demand for this sort of legislation has in nearly every case come from the churches themselves. As the denominations have grown in strength and have developed a more intelligent interest in their own characteristics, many of them have tried to legalize in a way the essential features of their

respective polities. Through these supplemental provisions, there has been wrought into the statute law the recognition of purely ecclesiastical functionaries. It cannot now be said to be the intention of the legislatures to keep the control of the temporal affairs of churches in the hands of corporations, "independent of priest, bishop, presbytery or synod or other ecclesiastical judicatory." There is at the present time a marked legislative cordiality towards the churches. While at the beginning of the century the policy in legislation was to treat all religious interests alike, by doing as little as possible for any of them and forcing all to conform to one procedure, at the end of the century the policy seems to be to treat all interests alike, by giving to each all that is asked.

The early concept of religious organization in American law was very naturally that of a simple and completely autonomous local society. To denominations whose type of government corresponds to this concept, the legislation of the general-statute era was satisfactory. The special optional provisions referred to have, therefore, been enacted for the benefit of churches having polities by which the local bodies sustain definite relations to some more general authority. It has been those denominations which have an administrative or episcopal type of organization that have shown the greatest energy in securing denominational legislation of the character mentioned. At the present time, twenty-five distinct religious denominations have been thus specially legislated for. The statutes of sixteen states now contain special provisions for the incorporation and regulation of Protestant Episcopal churches. Eight states make similar provision for Roman Catholic churches and seven states for Methodist Episcopal churches.

Another feature of recent development — one of especial interest to students of American ecclesiology — is the increase in the number of statutory provisions for the creation of ecclesiastical corporations sole. This form of corporation is not used in New York, and at the present time is expressly forbidden in the states of Pennsylvania, Delaware and Michigan. On the other hand, in the states of Massachusetts, New Jersey and

Oregon, individual executive functionaries — such as superintendents, presiding elders, bishops and archbishops — may be constituted corporations sole, with all the powers granted by the general acts to corporations aggregate. By these provisions a civil corporate capacity is made to attach to an ecclesiastical office. Should the social environment of churches in the United States foster the development of executive forms of ecclesiastical association, it seems likely that an increasing use would be made of the ecclesiastical corporation sole.

Another marked advance in the general movement to give more definite legal status to ecclesiastical institutions seems to have been made by the New Jersey act of March 15, 1898, which vests whole religious denominations within the state, even though they consist of undetermined numbers of individuals, with legal personality, without recourse to incorporation, to the extent of allowing them a standing in the courts by means of self-appointed representatives. In whose interest this law was enacted has not yet appeared, and no construction of the act by the courts has yet come down to enlighten us.

We are in the midst of still another interesting development of the civil church law. Efforts are now making in several states by the "Christian Scientists" to secure legal incorporation for religious purposes, with additional features that usually pertain to schools for the teaching of medicine. The "Metaphysical College" has been chartered in Massachusetts, but the effort of the "Christian Scientists" in Pennsylvania has so far failed. Judge Pennypacker, *In Re* First Church of Christ, Scientist, in Philadelphia, in 1897 denied the application for a charter "to preach the Gospel according to the doctrines of Christ, found in the Bible and stated in the tenets of Christian Science." Accompanying certain tenets of faith stated in the application for a charter were rules of which the first prescribed:

> To become a member of the First Church of Christ Scientist in Philadelphia, Pa., the applicant must be a believer in the doctrines of Christian Science, according to the teaching contained in the book *Science and Health, with Key to the Scriptures*, by the Rev. Mary Baker G. Eddy. The Bible and the above-named book, with other works by

the same author, must be his only text-books for self-instruction in Christian Science and *for practicing metaphysical healing.*

It is only fair to say, however, that this application was denied on the ground that public policy at the present time forbade a recognition by the civil authorities of a "metaphysical" system of dealing with the morbid physical conditions of the human body. The question has been raised, but not yet answered, whether legal sanction is to be secured under current statutes or by new legislation for a corporation to combine ecclesiastical and medical functions. The conditions seem to be favorable to the appearance of such hybrid institutions.

The privilege that is being accorded to religious bodies, of having such legislation enacted for them as best develops their respective polities, seems to be resulting in what may be defined as a legal crystallization of ecclesiastical polity. Presbyteries, conferences, synods, classes, conventions, superintendents, overseers, presiding elders, vicar-generals, bishops and archbishops are coming to have a legal status by virtue of their ecclesiastical status and legal powers incidental to their spiritual jurisdiction. Such features of ecclesiastical organization as secure recognition in the civil law are thereby made more rigid than the non-legal features, and more capable of resisting the influences of social environment.

Lastly, we are on the threshold of a far wider development of our civil church law, by reason of the recent expansion of the national sovereignty and the authority of the Federal government over populations having long-established ecclesiastical institutions and presenting problems entirely new to our ecclesiastical policy. One ecclesiastical result of recent events has been the technical lapse of certain portions of the communion of the Roman Church into the status of *terra infidelium.* Definite legal results cannot, however, be expected until the substitution of civil for military government is complete.

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